

# S. 600—An Unnecessary and Dangerous Foray into Classic Populism

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## I. INTRODUCTION

On March 8, 1979, Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee, introduced S. 600, an antimerger bill that, if passed, could well be the most radical piece of antitrust legislation enacted in many years.<sup>1</sup> Traditionally, our antitrust statutes have been concerned primarily with protecting and promoting competition by eliminating specific anticompetitive restraints in the market. In contrast, S. 600 and other similar anticonglomerate merger bills now pending in Congress<sup>2</sup> are based on the thesis that "bigness is badness," and that large corporations, by their very size, endanger the social and political fabric of our country, and therefore must be curbed. Thus, S. 600 exposes with rare clarity the inherent ambivalence in antitrust policy between (1) the "populist" theme that "bigness is bad, or at least highly suspect;" and (2) the economic efficiency theme that a free competitive market, unhampered by Government intervention, will best serve the consumer welfare.

It is likely that the merits of S. 600 will continue to be debated in the months ahead. The purpose of this article is to explore the policy implications of S. 600 and, in so doing, to demonstrate that S. 600 is an unnecessary and potentially damaging piece of "regulatory" legislation that should not be enacted.

## II. WHAT WOULD S. 600 DO?

S. 600 was prompted by a recent wave of conglomerate merger activity,<sup>3</sup> which the antitrust enforcers believed themselves unable to deal

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1. See 125 CONG. REC. S2417 (daily ed. March 8, 1979). The bill is sponsored by Senators Metzenbaum, McGovern, Nelson, Pressler, and Kennedy. In mid-December, the Antitrust Division formulated its own conglomerate merger bill that, in most respects, was similar to S. 600. The Administration has, as yet, taken no stand on S. 600.

2. See, e.g., S. 1246, 96th Cong., 1st Sess. (1979) (prohibiting mergers by major petroleum companies).

3. The proponents of S. 600 report that the number of corporate mergers and acquisitions with a purchase price of \$100 million or more increased from 14 in 1975, and 41 in 1977, to 80 in 1978. 125 CONG. REC. S5713 (daily ed. May 10, 1979). They also report that most, though not all, of the mergers within the past several years have been conglomerate rather than horizontal or vertical. See *Mergers and Economic Concentration: Hearings on S. 600 Before the Senate Comm. on the Judiciary*, 96th

with effectively by utilizing traditional section 7 tools.<sup>4</sup> If enacted, S. 600 would bring to a halt most acquisitions by and between the largest 500 corporations in this country.

First, section 2(a) of the bill establishes an outright ban against mergers between corporations each of whose assets or sales exceed \$2 billion. It has been estimated that this provision would apply to the largest 100 firms in the country.<sup>5</sup>

Second, S. 600 provides an elaborate "regulatory" barrier to any merger when both parties exceed \$350 million in assets or sales, or when one party exceeds the \$350 million threshold and the other has at least a twenty percent market share in a \$100 million market. Proponents of the bill estimate that this provision would encompass the 500 largest firms in the country.<sup>6</sup> A merger can pass the regulatory barrier if its proponents can establish either that it "will have the preponderant effect of substantially enhancing competition" or "will result in substantial efficiencies." It can also pass muster under a "spin off" provision: the acquiring corporation must spin off comparably valued assets as a going concern within a year, before or after, the subject merger. The Attorney General, the FTC, and private parties are all empowered to enforce these provisions through injunctive relief. In addition, S. 600 makes clear that it is entirely in addition to existing remedies including, most particularly, Section 7 of the Clayton Act,<sup>7</sup> which already bars any corporate merger the effect of which "may be to substantially lessen competition" in any relevant market.

The supporters of S. 600 acknowledge that S. 600 is based, not on traditional antitrust and economic considerations and procompetitive goals, but rather on broad social and political values. S. 600, which is appropriately entitled "The Small and Independent Business Protection Act of 1979," is, by its terms, intended "to preserve the diversity and independence of American business."<sup>8</sup> Thus, Senator Kennedy says that

[S. 600] reflects far more than a narrow or technical concern with the interaction of forces within a given market structure. It represents a far broader perspective—a social concern with the impact of corporate power not only upon the character and responsiveness of individual economic markets, but upon the very social and political fabric of a nation committed to diversity and, individual freedom of choice.<sup>9</sup>

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Cong., 1st Sess. 63 (1979) (statement of John H. Shenefield) [hereinafter cited as *S. 600 Committee Hearings*]. See generally FEDERAL TRADE COMMISSION, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS (1979).

4. 125 Cong. Rec. S2417, S2418 (daily ed. March 8, 1979) (remarks of Sen. Kennedy); *S. 600 Committee Hearings*, *supra* note 3, at 61-62 (statement of John H. Shenefield). See also *id.* at 16 (statement of Michael Pertschuk).

5. 125 CONG. REC. S3249 (daily ed. March 22, 1979).

6. *Id.*

7. 15 U.S.C. § 18 (1976).

8. 125 CONG. REC. S2417 (daily ed. March 8, 1979).

9. *Id.*

Similarly, Chairman Metzenbaum (D—Ohio) of the Antitrust and Monopoly Subcommittee says that S. 600 embodies “a new concern for the small businessman in this country.”<sup>10</sup> Freshman Sen. Pressler (R—S.D.), who relates the bill to his state’s “tradition of small farmers, independent businessmen and an economy that is very much based on entrepreneurship,” warns that “if we submit to purely economic considerations unmitigated by social and constitutional concerns, we will be guilty of allowing the evolution of structures which threaten our basic values.”<sup>11</sup>

The antitrust enforcers support S. 600 in equally sweeping (and vague) terms. “Our concern,” says FTC Chairman Michael Pertschuk “is with the discretionary power of the largest firms.”<sup>12</sup> Assistant Attorney General John Shenefield, as he then was, believes that “antitrust law as we now know it has played an inconclusive role” in dealing with large mergers, suggests rhetorically that S. 600 rests on self-evident Jeffersonian truths. In Mr. Shenefield’s words, “When our Founding Fathers said, ‘We hold these truths to be self-evident,’ nobody said, ‘What is your data? Where is it graphed on the supply and demand curve? What can we prove by virtue of computer readouts?’”<sup>13</sup>

S. 600 therefore embodies classic populism. Populism—a vague fear of bigness, and a commitment to decentralized economic power and decisionmaking—is, indeed, an important part of our political antitrust history. The fears and outrages of small farmers and businessmen against the “robber baron” abuses of the late nineteenth century had much to do with the political pressure that made it possible for Congress to enact the Sherman Act in 1890. President Wilson’s support for the Clayton Act, and Senator Kefauver’s sponsorship of the Cellar-Kefauver Amendments of 1950, both had in them very strong doses of populism.<sup>14</sup> These populist constituencies were a key ingredient to get Congress to do something—but what Congress *actually did* in each case was largely consistent with notions of economic efficiency.

When Congress has gone astray is when populist political concerns have been used to create statutes for the purpose of protecting competitors without regard to the costs imposed on consumers. Perhaps the Robinson-Patman Act is the most striking example of this. At the depth of the Depression, with small grocers and grocery wholesalers going under, Congress sought to protect those people against the new forms of competition being offered by supermarkets to more mobile consumers in

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10. *S. 600 Committee Hearings*, *supra* note 3, at 8.

11. *Id.* at 12.

12. *Id.* at 15. Chairman Pertschuk expressed particular concern about the campaign spending of political action committees and the extent to which large corporations have the ability to “mobilize resources” and mount effective lobbying efforts to achieve their own ends. *Id.*

13. *Id.* at 97.

14. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-23 (1962).

the emerging automobile age. The Robinson-Patman Act did not prevent small grocers from going under, but it did remain on the books with bad economic effects: it was an "antitrust" statute that tended to rigidify oligopolistic pricing and make it more difficult for innovative buyers and sellers to operate.<sup>15</sup>

As with the Robinson-Patman Act, S. 600 is a source of concern on "antitrust" and "efficiency" grounds. Interestingly, the basis for this concern is well stated by FTC Commissioner Robert Pitofsky:

[Most] conglomerate mergers are neutral from a competitive point of view, and many are procompetitive in allowing the introduction of vigorous new management or opportunities for efficiency through the coordination of complimentary assets. *Thus, much harm could be done to the competitive process and the economy by a misguided, overenthusiastic, and insufficiently discriminating conglomerate merger policy.*<sup>16</sup>

Section 7 of the Clayton Act, as amended in 1950, is also on point. As the Supreme Court noted in *Brown Shoe*,<sup>17</sup> a general populist concern about aggregate concentration was an important part of the political impetus that led to the 1950 amendments. Yet what Congress passed was a statute based on economics which used relevant markets as the key concept. The incipency test Congress included—a merger is illegal if its effect *may be* substantially to lessen competition—reflects a clear political judgment, a judgment to provide a strong "tilt" against a merger in a close case. What Congress did was to provide for a flexible inquiry, using market concepts to determine the merger's impact on defined markets. In essence, section 7 provides for a "rule of reason" inquiry that leaves the courts or the Federal Trade Commission free to take into account a wide range of economically relevant considerations.<sup>18</sup>

By contrast, S. 600 is a *per se* statute. It flatly bars all mergers between companies with sales or assets exceeding \$2 billion. It also sets up an elaborate regulatory barrier for all mergers between companies with assets or sales of over \$350 million as well as those in which one firm has \$350

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15. See U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 260 (1977). The final chapter of that Report concludes:

The evidence reviewed in this Report . . . seriously undermine[s] historic claims that the Robinson-Patman Act offers any sustaining economic protection to small business; and it raises serious questions whether the Act advances the competitive goals of other antitrust laws. Rather, the evidence is that the Act promotes high prices, restricted entry, and inefficiency in the distribution of goods; and it has encouraged the creation of illegal pricing exchanges by competing manufacturers. The fact that the Act does not apply at all to the offering of services—a growing sector in which small business is especially significant—reinforces the conclusion that the Robinson-Patman Act is not a key factor in preserving efficient small businesses. Rather, such businesses survive, in any field, largely on their ability to provide what the public wants: better service, greater convenience, and at times, lower prices.

16. Pitofsky, *New Perceptions at the Federal Trade Commission*, 3 ALI-ABA COURSE MATERIALS J. No. 4, 6, 125-26 (1979) (emphasis added).

17. *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-23 (1962).

18. *Cf. United States v. National Society of Professional Engineers*, 435 U.S. 679 (1978).

million in sales or assets and the other has a twenty percent share in a significant market.

In antitrust we have not used *per se* rules, except in circumstances in which the Supreme Court has found, based on actual experience, that a practice was so generally lacking in redeeming benefits that it was desirable on judicial efficiency grounds to avoid an elaborate inquiry in each case.<sup>19</sup> In the one instance in which the Supreme Court clearly went too far in imposing a *per se* rule in highly ambiguous and arbitrary circumstances,<sup>20</sup> the Court reversed itself a decade later and went back to a "rule of reason" inquiry.<sup>21</sup> The confusing and expensive *Schwinn-GTE Sylvania* history stands as a stark warning against unwise *per se* rules based on insufficient evidence or experience of market impact.

In short, most Americans probably share what Chairman Pertschuk labels the "Jeffersonian preference for dispersed power."<sup>22</sup> However, that is not the big issue in the debate on S. 600. What is at issue is how high a price we are willing to pay for such dispersal of power in the absence of any clear showing of specific pending evils, either social or political, and in the absence of any showing that such legislation is necessary to stem anticompetitive mergers. This is especially so since S. 600 would, as is discussed below, entail some real economic costs and prove quite difficult and costly to administer.

### III. THE FACTUAL BASIS FOR S. 600 IS NEBULOUS AND UNSUBSTANTIATED

S. 600 appears to be based primarily on the fear that conglomerate mergers are leading to increased economic concentration among the largest corporations in this country,<sup>23</sup> and that this economic concentration will, in turn, allow large corporations to exert undue political pressure to achieve their own ends. As has been pointed out by some observers, the thesis that economic concentration in this country is actually increasing is itself open to question.<sup>24</sup> Even assuming, however, that the economy is

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19. *Northern Pacific R. Co. v. United States*, 335 U.S. 1 (1958). Among the practices which are *per se* unlawful are: pricefixing, *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); division of markets among competitors, *see, e.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); group boycotts, *see, e.g., Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); and tying arrangements, *see, e.g., International Salt Co. v. United States*, 332 U.S. 392 (1947).

20. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

21. *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977).

22. *S. 600 Committee Hearings*, *supra* note 3, at 14.

23. *See* notes 4-6 and accompanying text *supra*. This increasing concentration is most often documented by statistics showing an increase in the percent of manufacturing assets held by the top 200 manufacturing firms. *See, e.g., S. 600 Committee Hearings*, *supra* note 3, at 80 (statement of John H. Shenefield). According to the testimony presented to the Committee, the percent of manufacturing assets held by the top 200 manufacturing firms show an increase in concentration from 46% in 1947 to 57% in 1963, to 61% in 1972. *Id.* The testimony also shows, however, that only about 13% of this growth in assets of the top 200 firms was attributable to mergers and acquisitions. *Id.* at 63.

24. A number of observers have found the concentration statistics based on the assets of the top 200 manufacturing companies (which are most often used to support claims of increasing concentra-

more concentrated than it was a decade ago, and that conglomerate mergers have contributed to that increased concentration, this does not necessarily lead to the conclusion that large corporations are able to exert undue political power to achieve their own ends. To the contrary, the most effective lobbyists for protective "regulatory" schemes tend to be smaller businesses, which are spread across the country in most Congressional districts and which are well organized to take their case to Congress and the state legislatures. While Congress tends to turn a generally deaf ear to auto makers and oil companies on such issues, small local dealers have little difficulty in securing a growing wave of automobile dealer and gasoline dealer protection legislation.<sup>25</sup> In short, it is the local dealers, through their effective organizations, that are winning the legislative battles, not General Motors or Exxon.<sup>26</sup> Furthermore, the legislative measures that are now being pushed under the "bigness is badness" flag are plainly anticonsumer—a point eloquently made by John Shenefield in his testimony opposing the gasoline dealers' protection legislation in Virginia.<sup>27</sup>

The alleged social evils the proponents of S. 600 seek to address in S. 600 are also ill-defined and are based entirely on limited anecdotal evidence. In addition to the general "populist" fears which appear to be the central concern of S. 600,<sup>28</sup> the proponents of S. 600 also contend that conglomerate mergers lead to plant closings and the replacement of local managerial personnel by personnel selected by the absentee conglomerate and that such activities may impact adversely on the social welfare of the communities in which the acquired firms are located.

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tion) to be misleading, and note that other measures indicate there has been little, if any, increase in concentration over the last thirty or forty years. See, e.g., Ehrbar, *'Bigness' Becomes the Target of the Trustbusters*, *FORTUNE*, March 26, 1979, at 37; *S. 600 Committee Hearings*, *supra* note 3, at 7 (remarks of Sen. Thurmond indicating that the number of corporations in various size ranges has increased dramatically in recent years and that the increase in the assets of the top 200 firms is due largely to an increase in the assets of firms in the petroleum and petrochemical industries which have been investing heavily in response to the energy crisis).

25. Ohio has recently joined this list with the enactment of S. 206 on December 12, 1979, which amended chapter 4517 (and related provisions) of the Revised Code to give special protection to automobile dealers.

26. One qualification to this general point is appropriate: when a *very large* enterprise is faced with business failure—generally resulting from its inability to be a strong factor in the market—then the enterprise, *working closely with its labor unions, bankers, and civic groups* is sometimes able to get some form of "bail out" legislation from the government. Lockheed did a few years ago and Chrysler seems to be doing so now. While such "bail out" legislation may be of questionable economic wisdom, it does not reveal any *general* political power of large corporations that requires the broad cures of S. 600.

27. In his testimony, then-Assistant Attorney General Shenefield stated:

In considering the merits of divorcement legislation, it is important to bear in mind that consumer interests are not necessarily identical to the interests of individual competitors; indeed, consumer interests are relatively fragile and can be easily sacrificed if the competitive process is distorted or stifled. . . . Indeed, the very breadth of this legislation suggests that its effect would be to restrict rather than promote competition.

*Retail Marketing Divorcement and Divestiture Legislation: Hearings Before the General Laws Committee of the Virginia House of Delegates 2*, 15 (Richmond, Va. 1979).

28. See notes 4-6 and accompanying text *supra*.

Both purported "evils" are based on a virtually non-existent data base. As to the first problem—local plant closings—the proponents of S. 600 point to a few isolated instances in which a plant in a given location was closed down following a merger.<sup>29</sup> Plant closings, however, are a normal, healthy part of the competitive process, and, as noted in the hearings on S. 600, none of the proponents of that legislation have offered any empirical data to demonstrate that such plant closings occur with disproportionate frequency as a result of conglomerate mergers.<sup>30</sup> Similarly, the replacement of management personnel from outside the local community does not necessarily represent a social problem, for, as is developed more fully below,<sup>31</sup> the entrenchment of less competent incumbent managements is hardly a laudable social or economic goal. Furthermore, the proponents of S. 600 have been unable to point to any generalized, empirical data indicating either the dimensions of the perceived problem, the extent to which the problem is associated with conglomerate mergers in particular, or the extent to which the replacement of local management personnel by outside personnel selected by the conglomerate actually impacts adversely on the community or its overall social fabric.<sup>32</sup>

In short, as noted at the hearings on S. 600, there is almost a total lack of empirical data on the extent to which the asserted social or political problems associated with conglomerate mergers are indeed real. The evidence before the Committee has consisted only of isolated anecdotes from individuals who consider specific mergers to have been either "good" or "bad" for the communities in which they are located.<sup>33</sup> Such a meager and subjective data base simply does not provide a sufficient rationale for enacting S. 600 with its far-reaching implications and consequences. This is especially so since, as is developed below, the existing antitrust laws are adequate to prevent anticompetitive mergers. Furthermore, S. 600, if enacted, will likely entail significant economic risks and prove quite burdensome and costly to administer.

#### IV. EXISTING LEGISLATION IS SUFFICIENT TO PROTECT AGAINST ANTICOMPETITIVE MERGERS

Section 7 of the Clayton Act, the primary antitrust tool that has been used to attack mergers, proscribes those mergers "where in any line of commerce in any section of the country, the effect of such acquisition may

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29. See 125 CONG. REC. S2419 (daily ed. March 8, 1979); *S. 600 Committee Hearings*, *supra* note 3, at 4 (remarks of Sen. Kennedy citing closings at Youngstown Sheet and Tube and Colonial Press).

30. *Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.* 96th Cong., 1st Sess. 20 (Pt. 2 1979) (statement of William Baxter) [hereinafter *S. 600 Subcommittee Hearings*], *S. 600 Committee Hearings*, *supra* note 3, at 10 (remarks of Sen. Hatch).

31. See notes 52, 53 and accompanying text *infra*.

32. See *S. 600 Subcommittee Hearings*, *supra* note 30, at 50-52 (statement of Ira Millstein).

33. *Id.* at 51.

be substantially to lessen competition, or tend to create a monopoly."<sup>34</sup> Section 7, because it incorporates an "incipiency" rather than an actual effect standard, is a strong yet flexible tool for combating anticompetitive mergers.

Most antitrust learning in the merger field has arisen with regard to "horizontal" mergers, which involve direct competitors in the same market, and "vertical" mergers, which involve acquisitions of customers or suppliers. The legal rules applied to these types of mergers are so strict that relatively few horizontal or vertical mergers are now attempted. These strict rules are, of course, also applicable to conglomerate mergers that produce significant horizontal or vertical effects. For example, when a company wishes to make a second significant acquisition in the same field, the transaction probably would be treated as a "horizontal" merger and it would quite probably be challenged by the Justice Department under the rules set forth in *Philadelphia National Bank*<sup>35</sup> and its progeny.<sup>36</sup> Similarly, when the conglomerate company is attempting to acquire a supplier or a customer of one of its existing divisions or subsidiaries, the rules set forth in *Brown Shoe*,<sup>37</sup> *Ford Motor Co.*,<sup>38</sup> and other vertical merger cases might well be applied.

Some conglomerate mergers, however, include neither horizontal nor vertical effects.<sup>39</sup> It has been more difficult to frame simple market share rules to deal with this category of merger transactions since the particular effects on competition (if any) entailed by such mergers vary considerably depending on the particular facts of the merger. Nevertheless, viable theories have been developed in this area as well as in the horizontal and vertical merger area.

There are at least three theories that have proved viable in attacking conglomerate mergers. Moreover, there is one additional theory—the pure "deep pocket" theory—that seems to offer additional potential for attacking conglomerate mergers but which, as yet, is largely untried.

The most-used theory is that of "potential competition." This theory can be utilized when one of the leading members of a concentrated market proposes merging with one of a small group of likely potential entrants

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34. 15 U.S.C. § 18 (1976).

35. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

36. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964). See also *Department of Justice Merger Guidelines*, [1977] TRADE REG. REP. (CCH) ¶ 4510.

37. *Brown Shoe v. United States*, 370 U.S. 294 (1962).

38. *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). See also *Department of Justice Merger Guidelines*, *supra* note 36.

39. Although the concerns underlying S. 600 are purportedly directed to "pure" conglomerate mergers (i.e., those mergers which do not involve either horizontal or vertical effects), S. 600, as currently drafted, would also apply to pure horizontal and vertical mergers. Thus, it is possible that even those mergers that could survive the strict tests applied to such mergers under § 7 would nonetheless be "caught" by S. 600.



into that market. Potential competition may be "perceived" or "actual." Perceived potential competition describes an existing competitive effect resulting from the perception by firms in an oligopolistic market of the threat of entry by a potential competitor on the fringe of the market, regardless of whether the potential entrant has an actual intent of entering.<sup>40</sup> The Burger Court endorsed and applied this theory in *United States v. Falstaff Brewing Corp.*,<sup>41</sup> in which it held that section 7 may bar a merger by a firm that, although not in the market, presently exerts a beneficial influence on competitive conditions in the market by virtue of being perceived as a potential entrant by companies operating in that market. Under this theory, there need be no showing that the company actually would have entered the market *de novo* or through a toehold acquisition.

Actual potential competition ("future entry") describes a future competitive effect without any reference to whether existing competitors perceive its possibility: probable new entry by one of the merging companies will deconcentrate an oligopolistic market in which the other is a significant factor. In other words, under the actual potential competition theory, a conglomerate merger into a concentrated market may violate section 7 even if it has no present anticompetitive effect on the market because it precludes the acquiring company's entrance into the market *de novo* or through a toehold acquisition. While not without evidentiary pitfalls,<sup>42</sup> both of the potential competition theories remain viable doctrines for attacking conglomerate mergers.

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40. See *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-74 (1964); see generally, *Department of Justice Merger Guidelines*, *supra* note 36.

41. 410 U.S. 526 (1973).

42. See *S. 600 Committee Hearings*, *supra* note 3, at 65-66 (statement of John H. Shenefield). The Supreme Court's position on the actual potential competition theory is somewhat uncertain. The Court declined to endorse the doctrine in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 632-39 (1974); and in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973). In addition, the Court in *Marine Bancorporation* indicated that there were two preconditions to application of the theory: (1) the entering firm must have an "available feasible means" for entering the market other than by the challenged merger or acquisition; and (2) the alternative method of market entry must "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." *Id.* at 633. Both preconditions obviously impose a relatively heavy burden of proof on the government. See, e.g., *Black & Decker Mfg. Co.*, [1976-2] Trade Cas. ¶ 61,033 (D. Md. August 20, 1975); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 296-97 (4th Cir. 1977). Subjective evidence of future entry, however, is not required to make out a § 7 case. *United States v. Falstaff Brewing Corp.*, 410 U.S. at 532, 563-70 (Marshall, J., concurring in result).

Most recently, the Burger Court has avoided ruling on some far-reaching potential competition holdings of lower courts against particular mergers and has therefore left the status of the actual potential competition doctrine and associated evidentiary questions in doubt. The Court denied review in *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974), and, in *Phillips Petroleum Co. v. United States*, 418 U.S. 906 (1974), the Court summarily affirmed the district court decision holding a market extension acquisition invalid both because it removed "the likelihood that [the acquiring firm] would enter the market unilaterally in the future" and because it eliminated "the procompetitive influence [the acquiring firm] exerted from its presence on the edge of the market." 367 F. Supp. 1226, 1229 (C.D. Cal. 1973). Because *Phillips Petroleum* was grounded on both the potential and actual competition theories, the Supreme Court's affirmance does not necessarily indicate the Court's acceptance of the "alternate entry" theory.

A second theory—that of “reciprocity”—can be applied to block a merger when it can be shown that one of the merging firms makes significant purchases from companies that are, in turn, significant purchasers of goods in a market in which the other merging firm sells.<sup>43</sup> While the reciprocity theory is perhaps of more limited applicability than the potential competition doctrine, it too remains a viable economic theory for attacking conglomerate mergers.<sup>44</sup>

A third theory utilized to attack conglomerate mergers is “entrenchment.” This theory has been successfully used to attack acquisitions in which a large outside firm acquires a leading firm in a relatively concentrated or rapidly concentrating market.<sup>45</sup> The argument made is that the economic power of the acquiring firm could be utilized to shore up the acquired firm and entrench the market share of the acquired company.

A final theory that may be used to attack conglomerate mergers is what may be termed a pure “deep pocket” theory. This theory has significant potential for attacking conglomerate mergers while at the same time maintaining the traditional focus of the antitrust laws—to evaluate potentially harmful competitive effects in specific markets.

The extent to which the courts will be willing to apply this theory to conglomerate mergers is as yet unknown.<sup>46</sup> The Antitrust Division used the “deep pocket” theory in large merger cases that were filed to bar contested takeovers. The Antitrust Division lost the first of these cases, *United States v. United Technologies Corp.*<sup>47</sup> In the second case, *United States v. Occidental Petroleum Corp.*,<sup>48</sup> Occidental Petroleum attempted to acquire the Mead Corporation. In that case the government was able to put together a broad range of testimony by economic experts and competitors in the industry concerning the prospective impact of Occidental’s “deep pocket” on competition in the relatively concentrated paper industry. The case was never decided because Occidental, under pressure from the Justice Department and Mead, as well as from the SEC and the Ohio State Securities Commission, withdrew from the merger. Thus, it is not known how the court would have ruled on the government’s “deep pocket” theory. However, it appeared at the time that the government, with a reasonable evidentiary case, a good trial effort, and

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43. See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

44. See R. Donnem, *Reciprocity and Reciprocity Effects*, address to the Antitrust Law Section of the American Bar Association, August 12, 1969, reprinted in [1972] *TRADE REG. REP. (CCH)* ¶ 50,110 (summarizing case precedent and concluding that “reciprocity effect” theory constitutes a formidable basis for establishing antitrust violations); *Allis Chambers Mfg. Co. v. White Consol. Indus.*, 414 F.2d 506 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970); *United States v. White Consol. Indus.*, 323 F. Supp. 1397 (N.D. Ohio 1971).

45. See, e.g., *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *Ekco Prods. Co. v. FTC*, 347 F. 2d 745 (7th Cir. 1965).

46. See Baker, *Conglomerate Campaign Registers One Loss, One Draw in 1978*, *Nat’l L. J.*, January 15, 1979, at 22.

47. [1978-2] *Trade Cas.* ¶ 62,393 (N.D.N.Y. Dec. 6, 1978).

48. Civ. Nos. C-3-78-241/242/268/288 (S.D. Ohio 1978).

close cooperation with one of the merger parties, had a good chance of scoring a broad conglomerate merger victory in *Occidental*.

In sum, there are several viable legal theories that may be invoked to attack actual or likely anticompetitive effects of conglomerate mergers. Three of these theories have been accepted by the judiciary, and although they present some evidentiary problems, those problems are far from overwhelming. In addition, there exists the innovative but largely untested "deep pocket" theory, which could bar many conglomerate mergers while at the same time maintaining the traditional focus of the antitrust laws on adverse competitive effects in specific geographic and product markets.

Furthermore, it should be borne in mind that the efforts of the enforcement agencies to limit conglomerate merger activity cannot be measured solely or even primarily by the win/loss record of the enforcement agencies in court.<sup>49</sup> In the past, the mere threat of intervention by the Antitrust Division or the Federal Trade Commission often has been sufficient to stop potential mergers. Now, with the new pre-merger notification requirements imposed under title II of the Hart-Scott-Rodino Act,<sup>50</sup> the agencies will have an even greater opportunity and even more lead time to intervene in merger proceedings. In addition, the antitrust agencies will have a much improved data base for determining what anticompetitive mergers they should oppose and what procompetitive mergers they should not oppose. This case-by-case evaluation is a far more discriminating mode of assessing the potentially adverse impacts of conglomerate merger activity than is the extremely broad brush approach created by S. 600.

## V. THE ENACTMENT OF S. 600 WOULD ENTAIL SIGNIFICANT ECONOMIC RISKS

The enactment of S. 600 would likely entail substantial economic risks that must be balanced against the social and political goals S. 600 is meant

49. Proponents of S. 600 contend that § 7 is not a viable tool to deal with conglomerate mergers because the government in recent years has lost most of the conglomerate merger cases it has brought. See 125 CONG. REC. S2417, S2418 (daily ed. March 8, 1979) (remarks of Senator Kennedy); S. 600 Committee Hearings, *supra* note 3, at 61-66 (statement of John H. Shenefield). In large part, however, this failure appears to be due, not to the inherent weakness of § 7, but rather to the increasing tendency of the lower courts to follow the Burger Court's instructions to look closely at the market realities in each case and to demand substantial evidence of anticompetitive effect before invalidating a merger or acquisition. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

In contrast to the Warren Court, the Burger Court has, in general, eschewed the *per se* rules of illegality that the Warren Court favored, see, e.g., *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 365-69 (1970); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-71 (1963), in favor of full scale evidentiary consideration of specific market conditions and industry facts in considering the anticompetitive effects of a merger or acquisition. See, e.g., *United States Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Consequently, it may be true that the Government is now finding it more difficult to obtain favorable outcomes in merger cases than it did during the Warren Court years. But this greater evidentiary burden certainly is not sufficient reason to enact broad, indiscriminate *per se* legislation against conglomerate mergers such as that embodied in S. 600.

50. 15 U.S.C. § 18A (1976).

to achieve. For example, S. 600, if enacted, may create disincentives to innovation and risk-taking that lie at the heart of our free enterprise system. S. 600 sets arbitrary size limits measured by sales and assets. Normally, it is procompetitive and in the best interests of our economy for new firms to attempt to increase their sales and assets by making wise—though perhaps risky—investments and by pioneering in the development of new products and production techniques. Yet, if S. 600 is enacted, firms will be put on notice that if they grow too much, they may exceed the arbitrary size ceilings set forth in S. 600. S. 600 may therefore create real disincentives for firms, both large and small, to grow as much and as rapidly as they otherwise would have attempted to do.

Small firms, in particular, would face an uncertain future if S. 600 were enacted. One major incentive that fuels the entrepreneurial spirit and growth of small firms is their ability to sell out at a profit to large firms once they become successful. Often, the only ready buyer for such businesses is a large conglomerate. If such firms perceived that their future saleability would be foreclosed once they reached the “magic” dollar ceilings set forth in sections 2(b) and 2(c) of S. 600, the business and investment decisions made by those firms could be significantly less growth-oriented than they otherwise would be. The burdensome nature and the uncertainty of the affirmative defenses<sup>51</sup> would likely deter the innovator from making investment decisions *far in advance* in the hope that he *might possibly* prevail years later if he wanted to sell out.

The enactment of S. 600 could also undermine the beneficial effects of hostile takeovers by contributing to the entrenchment of less competent managements. From a business perspective, takeovers are risky and uncertain under the best of circumstances and recently proposed SEC and Federal Reserve Board Rules would further discourage takeover activity.<sup>52</sup> S. 600 would bring much of the takeover activity relating to the top 500 corporations in this country to a halt by creating virtually insurmountable barriers to acquisitions among and by these corporations. Without the threat of outside takeovers, less competent managements will be less concerned about corporate efficiency and profitability. Thus, the diminution of hostile takeover activity that would inevitably result from the enactment of S. 600 clearly entails economic and social costs to consumers as well as to stockholders.<sup>53</sup>

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51. See Part VI (B) *infra*.

52. See *Wall Street's Rush to Beat the New Merger Rules*, THE ECONOMIST, March 17, 1979, at 113.

53. The question of the social utility of hostile takeovers was thoroughly considered in connection with the enactment of the Williams Act and the amendments to that Act, 15 U.S.C. §§ 78m(d), (e), 78n(d), (e), (f) (1976). Recognizing the social utility of hostile takeovers, the Williams Act attempts to maintain a neutrality between the bidder and the target companies. Parenthetically, it should be noted that S. 600 would have the effect of overriding this policy decision by making it virtually impossible for many of this country's most aggressive corporations to acquire firms that are not effective competitors in their markets.

Passage of S. 600 could also have adverse effects on international trade by reducing the United States' ability to compete abroad. Large, highly diversified organizations have the stability to withstand the ups and downs in inherently unstable international markets and are oftentimes the only organizations that are both willing and able to take the substantial risks entailed in doing business abroad. Yet S. 600 would set artificial limits on the growth of highly diversified domestic industries at the same time that other countries, including Canada, the Common Market countries, and Japan, are attempting to increase the ability of their industries to compete more effectively in the international marketplace by encouraging the growth of mergers and cartels and by otherwise subsidizing their domestic industries. Many view the relatively small volume of United States exports as a significant factor in our balance of payments difficulties. S. 600, if enacted, would likely exacerbate this problem.

S. 600 could also have an adverse impact on foreign investment in this country—investment that has often proven very important to the competitiveness of our domestic markets. S. 600 does not specify whether it is also intended to apply to foreign firms. However, there appear to be only two major options with respect to dealing with acquisitions by foreign firms in the legislation and neither is attractive from a policy viewpoint. On the one hand, foreign firms could be fully exempted from S. 600. However, if this were done, foreign firms would have a decided advantage over domestic firms in making acquisitions in this country, just as foreign banks have had a decided advantage over domestic banks in making domestic acquisitions because of the limitations against domestic bank acquisitions imposed by the Glass-Steagall, McFadden, and Bank Holding Company Acts.

Alternatively, foreign firms could be made fully subject to the S. 600 limits on corporate acquisitions. This alternative, however, aside from engendering possible diplomatic problems, would also be likely to lead to reduced foreign investment in this country. It is unlikely that foreign firms that, even now, see themselves as inhibited by our antitrust laws from maximizing their investments in this country, will even attempt to make acquisitions that are within the purview of S. 600 if they know they will have to prove in our courts that such acquisitions are procompetitive or that they have "spun off" other business units equal in value to those acquired.

The enactment of S. 600 could also have an adverse impact on the finding of ready buyers for marginal enterprises. Often, the only buyer both able and willing to buy an unprofitable company is a large conglomerate. General Motors' recent sale of Frigidaire to White Consolidated Industries is but one case in point. GM, which had lost money in the appliance business, decided to get out of the business and convert its plant to automotive production. White, already in the very competitive appliance business, was the only capable buyer. GM argued to

the Department of Justice that the sale of Frigidaire would enhance the competition faced by the two largest full-line appliance companies, White and Whirlpool. The Department ultimately decided to allow the transaction to go through even though Frigidaire is a brand name producer and both corporations were large. The Department noted that "the transaction may eliminate previous competition between White and Frigidaire but General Motors' discontinuance of production of Frigidaire appliances and the absence of any other purchaser interested in the assets were instrumental in the decision not to challenge the transaction. . . ."<sup>54</sup> If GM had been prevented from selling Frigidaire to White merely because of the size of the companies involved, a significant brand would have been eliminated from the appliance business, presumably to the great benefit of the already dominant producers. Thus, S. 600, by eliminating our largest corporations as potential buyers, may have the effect of turning many floundering companies, which could have been saved or reinvigorated by the infusion of new capital and talent, into "failed" or "shut-down" companies. Such a result simply cannot be reconciled with the procompetitive goals of our antitrust laws and the concept of maximizing competition upon which our economy is based.

#### VI. S. 600 WILL ALSO BE DIFFICULT AND COSTLY TO ADMINISTER

##### A. *Definitional Problems*

The enactment of S. 600 would have the effect of vastly increasing the complexity of administering the antitrust laws. S. 600 creates three categories of mergers, all of which are subject to different legal standards. Into which category a given acquisition will fall depends entirely upon the size of the "sales" or "assets" of the acquired and the acquiring companies. "Assets" and "sales," however, are not self-defining concepts, and S. 600 provides no definition of these critical terms.

Several examples of this definitional problem may be noted. For example, S. 600 does not indicate how a firm's assets are to be valued, although there are a number of alternatives that could produce widely varying results, including present value, original cost, or original cost less depreciation. Nor does S. 600 indicate how to treat assets held under a variety of legal arrangements, including long-term lease arrangements, sale-and-leaseback arrangements, lease-with-purchase-option arrangements, and so forth. Even more importantly, S. 600 does not indicate whether a firm's assets or sales are to be measured on a net or on a gross basis; whether a firm's assets or sales are to include the assets or sales of its subsidiaries; or whether a firm's assets or sales are to be measured on the basis of a firm's total assets or sales, including any foreign-based assets

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54. Department of Justice Press Release (April 5, 1979).

or sales. If the assets of subsidiaries are to be included, there may be additional definitional problems depending on whether a subsidiary is wholly or partially owned. The problem of foreign-based assets or sales is particularly complex, for if foreign assets or sales are to be included in computing the dollar ceilings contained in section 2 of S. 600, how can such assets or sales be valued in view of constantly fluctuating currency exchange rates?

Furthermore, the dollar ceilings established by S. 600 may affect different industries in markedly different ways, for the same dollar sums may mean very different things to different industries. For example, \$350 million in assets held by a bank may differ radically in terms of competitive analysis from \$350 million in assets held by a manufacturing firm, and \$350 million in sales for a grocery store chain and \$350 million in sales for an aerospace firm may be at least as different competitively. Yet all these entities are treated the same way under S. 600. In short, the dollar cut-offs established in S. 600 are too crude and arbitrary to be meaningful.

#### B. *Problems With the Affirmative Defenses*

Section 3 of S. 600 establishes three affirmative defenses that can—at least theoretically—be utilized by firms whose contemplated acquisitions fall within sections 2(b) and 2(c) of S. 600. The first of these defenses would allow a merger to go forward if the parties can prove that “the transaction will have the preponderant effect of substantially enhancing competition”; the second would do the same if the parties could prove that “the transaction will result in substantial efficiencies.” The third would allow the merger to go forward if the acquiring party “spins off” assets equal to or greater than those of the acquired party.

The first two of these defenses (the burden shifting approach) would likely lead to complex, costly, and unworkable litigation as Chairman Pertschuk has predicted.<sup>55</sup> Implementation of the shifting burden of proof approach would create uncertainties in both the business world and in the courts for some time to come. Mergers entail long-term structural changes, and the current law, with its antimerger tilt, already requires the courts to determine whether a contemplated merger “may” in the future have the effect of creating a monopoly or lessening competition. S. 600, however, requires the acquiring firm to meet the almost impossible burden of proving that a given transaction *will* substantially enhance competition or *will* result in substantial economic efficiencies. How does one prove, for example, that one manager is better than another, and further, that a contemplated change of management effected through a merger *will* “substantially enhance competition”? How does one prove that increased economies of scale or increased specialization *will* result from a given

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55. S. 600 Committee Hearings, *supra* note 3, at 16 (remarks of Mr. Pertschuk); the Antitrust Division, however, favors the burden shifting approach. *Id.* at 70 (remarks of Mr. Shenefield).

transaction, and further, that such changes *will* "substantially enhance competition"?

An equally problematic issue is that presented by the "preponderant effect" burden of proof standard imposed under section 3(a)(1) of S. 600. What exactly does this standard require? If a merger can be shown to have created 1,000 new jobs, is this sufficient to meet the "preponderant effect of enhancing competition" standard? Probably not, since the creation of jobs, while socially and economically desirable, would probably not have the "preponderant effect" of enhancing competition. Or what if a merger that affected a total of twenty relevant markets would have a procompetitive effect with respect to three of the markets and a neutral effect on the remaining markets? Would this merger be found to have the "preponderant effect" of enhancing competition and thus pass muster under S. 600? What if it were three out of thirteen markets? Or three out of seven markets? Unfortunately, S. 600 provides no useful guidance whatsoever to the courts on these critical questions.

In short, the burden shifting, "regulatory" approach embodied in S. 600 is both complex and uncertain. Excessive government regulation, in part because of the uncertainties generated by such regulation, has quite rightfully been charged with having undermined productivity and innovation in the private sector. Similarly, the "affirmative defenses" contained in S. 600 are so uncertain in terms of both meaning and potential effect that the proposed legislation could have the untoward effect of deterring most firms from attempting to effect mergers which could fall within one of the affirmative defense categories even though many such mergers would prove beneficial from both an economic and a social point of view.

The third affirmative defense also presents problems. Mr. Michael Pertschuk, Chairman of the FTC, favors the "forced divestiture" or "cap and spin-off" approach, which is incorporated as the third affirmative defense in section 3(a)(3) of S. 600. This approach would appear to be somewhat less cumbersome to administer than the burden-shifting approach would be, but it, too, is complex. The experience of the Supreme Court in overseeing the "divestiture without delay" in *El Paso*<sup>56</sup> provides an extreme example of how complicated and time consuming it is for the courts to supervise divestitures under our present antitrust laws. Even in the normal case, it is seldom easy because of the difficulties in finding a suitable buyer for the stock or assets to be divested and the problems inherent in unscrambling commingled assets. Indeed, the difficulty in locating a viable purchaser for a business unit for which divestiture has

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56. *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. El Paso Natural Gas Co.*, 358 F. Supp. 820 (D. Colo. 1972), *aff'd mem.*, 410 U.S. 962 (1973); *United States v. El Paso Natural Gas Co.*, 291 F. Supp. 3 (D. Utah 1968); *United States v. El Paso Natural Gas Co.*, [1972] Trade Cas. (CCH) ¶73,975 (D. Colo. July 26, 1971).



been ordered often proves so great that the government agrees to a sale that itself might well have been challenged as anticompetitive if undertaken by the purchaser in the first instance.<sup>57</sup>

Section 3(a)(3) of S. 600 would entail many of the same practical problems that have already been experienced in administering the divestiture remedy under our current antitrust laws. But it would be worse—especially when a marginal competitor is involved—because not only would a buyer have to be found, but any large buyer would have to be prepared to spin off *even less desirable* assets in order to make the purchase.

The problems do not end there, however, for section 3(a)(3) of S. 600 also raises many new and complex valuation questions that the courts fortunately do not have to address in current antitrust divestitures. As previously suggested, “assets” and “revenues” are not self-defining terms, and differing accounting conventions and procedures followed by different firms may themselves provide wildly different estimates of asset values. What about the firm that tried for a year to sell without success a \$100 million book value plant and then shut it down and sold it for scrap? Would that count as divestiture, let alone a \$100 million divestiture? A very complex divestiture could become the functional equivalent of a utility commission rate case with testimony and counter testimony over the value of the “rate base”.<sup>58</sup> Would depreciation be taken into account in measuring assets? Or destruction by weather or war? Would obsolescent assets be measured in terms of their book value or the cost of replacing them by new and more efficient technology? There has been extensive utility litigation on all these subjects, but even these utility decisions provide no clear coherence or guidance if Congress wanted to try to use them to find a way out of this “regulatory bog.”

These valuation problems are even further magnified if foreign firms or the foreign assets of domestic firms, or both, are taken into consideration. For example, could a domestic corporation attempt to defend a domestic acquisition falling within the purview of S. 600 by contending that it had within the past year divested a business unit located abroad which had “assets” “equal to” those of the newly acquired unit? If so, how would such foreign assets be valued by the court, given fluctuating currency exchange rates (not to mention the fact that the assets on the books of the divested unit could have been valued using much different accounting principles than were the assets on the books of the newly

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57. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST*, 673-74 (1977). For example, in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the government allowed the Kinney retail stores to be purchased by F. W. Woolworth. In *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962), the government allowed the stock and assets of St. Helen's Pulp & Paper Co. to be sold to another paper producer. In *United States v. Continental Can Co.*, 378 U.S. 441 (1964), the government allowed the Hazel Atlas glass-container producing plants to be sold to Brockway Glass, a competitor of Hazel Atlas.

58. See generally, I A. KAHN, *THE ECONOMICS OF REGULATION* 35-41, 103-22 (1970).

acquired unit)? Even for financial experts, such problems are complex; for judges not schooled in the intricacies of corporate finance and accounting, the difficulties in trying cases under S. 600—especially in view of the lack of guidance contained in the proposed legislation—could prove overwhelming.

Even more importantly, the “forced divestiture” option could undermine the very social goals S. 600 is meant to achieve. Although section 3(a)(3) of S. 600 allows divestiture of only “viable” business units, a firm that wished to acquire additional assets would normally spin off its least viable business units to meet the section 3(a)(3) requirement. Such business units often may not be able to survive on their own. If so, the employees of the divested unit would lose their jobs. At the very least, section 3(a)(3) would encourage perpetual and often irrational “spin-off” activity, which, in and of itself, could lead to substantial economic and social disruptions in those communities in which the “spun-off” firms are located. In short, if one is concerned about the purported adverse social effects of large conglomerates, it also seems reasonable to ask whether the “forced divestiture” option would not actually increase the likelihood of economic and social disruptions and lead to lesser rather than greater job stability and economic opportunities for those employees who could be affected by the spin-off activity generated by section 3(a)(3) of S. 600.

## VII. CONCLUSION

S. 600 should not be enacted. It is not “antitrust” legislation. It is populist “regulatory” legislation based on ill-defined goals that give inadequate weight to the true costs likely to be incurred if the legislation were enacted.

The supporters of S. 600 should ask themselves whether their proposed legislation can meet the test for “government regulatory” legislation laid down in chapter 9 of the recent report of the National Commission for the Review of Antitrust Laws and Procedures.<sup>59</sup> That test provides a particularly valid standard because some of the most prominent sponsors and supporters of S. 600—including Senator Kennedy, Senator Metzenbaum, Chairman Pertschuk, and Assistant Attorney General Shenefield—themselves signed that report. The National Commission unanimously recommended:

1. Free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy.

2. Exceptions from this general principle should only be made where there is compelling evidence of the *unworkability of competition* or a clearly paramount social purpose.

3. Where such an exception is required, the least anti-competitive method of achieving the regulatory objective should be employed.<sup>60</sup>

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59. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 177 (January 22, 1979).

60. *Id.* (emphasis added).

As far as S. 600 is concerned, there is no showing of "the unworkability of competition," at least no showing based on the records established in the hearing thus far. The most that can be gleaned from the hearings to date is that the supporters tend to feel some sort of generalized fear about the economy becoming concentrated in very few hands as a result of recent merger activities.

One can sympathize with government enforcers who find that conglomerate merger cases under section 7 often are not easy to win. While the government has lost some conglomerate cases that it ought to have won,<sup>61</sup> it also has won some cases that it ought to have lost.<sup>62</sup> These are simply the hazards of litigation. Yet, despite some surprises and disappointments, the government has generally done well in the conglomerate area under section 7. To argue that section 7 is "ineffective" in the conglomerate area is to lose sight of what section 7 is intended to do. It is not a "stop big mergers" statute; it is a "stop incipient losses of competition" statute. It is directed to consumer welfare, not business protection.

To displace a generally effective "consumer welfare" statute with a "business protection" statute would be unwise. The fact that the latter is unfocused in purpose, protectionist in effect, and difficult to administer makes it even worse.

In short, this is a time for care, not emotion. Then Assistant Attorney General Shenefield's recent remarks about the risks facing "all once and future social engineers"<sup>63</sup> is correct:

[T]he bottom line lesson of regulation is that we should be exceedingly careful before leaping forward with new and innovative regulatory solutions, especially those that too easily discard the benefits of an efficiently functioning marketplace. The best ideas today may prove inadequate or debilitating in much less than a single generation.<sup>64</sup>

As Commissioner Pitofsky has warned, "[m]uch harm could be done to the competitive process and the economy by a misguided, overenthusiastic and insufficiently discriminating conglomerate merger policy."<sup>65</sup> Unfortunately, S. 600 embodies just such a policy.

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61. See, e.g., *United States v. First Nat'l Bancorporation*, 329 F. Supp. 1003 (D. Colo. 1971), *aff'd by an equally divided court*, 410 U.S. 577 (1973), in which there were by law few other qualified potential entrants.

62. See, e.g., *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir.), *cert. denied*, 416 U.S. 909 (1972), in which there were a large number of alternative potential entrants. Interestingly, the same judge who found against the Justice Department in *First Nat'l Bancorporation* was elevated to the Tenth Circuit when he sustained the FTC's findings in *Kennecott*.

63. J. Shenefield, *The Deregulation of Government Enterprise—The Next Frontier for Regulatory Reform*, NEW YORK, April 12, 1979, at 1.

64. *Id.* at 17.

65. See Pitofsky, *supra* note 16, at 8.

